Supreme Court U.S.
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No. 92-1584

In The

Supreme Court of the United States

October Term, 1992

JOSEPH HOFFMAN,

Petitioner,

vs.

JANICE HARRIS, Personal Representative of the Estate of Herbert Harris, and JANICE HARRIS, Individually, and SCOTT HARRIS and JEFFREY HARRIS,

Respondents.

On Petition For A Writ Of Certiorari To The Fourth District Court of Appeal For The State Of Florida

BRIEF IN OPPOSITION

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PREFACE

The petitioner was an appellee/defendant in the lower courts and the respondents were the appellants/plaintiffs. The parties will be referred to by name or as plaintiffs and defendant.

The following symbol is used:

A – Petitioner's/defendant's Appendix

STATEMENT OF THE CASE AND FACTS

The plaintiffs cannot agree with the defendant's statement of the case and facts, because it is inaccurate and incomplete. The entire opinion of the Fourth District Court of Appeal is as follows:

PER CURIAM.

> Viewed in the required light most favorable to appellees as the jury verdict winners, the record demonstrates as a matter of law that there was no justification for Officer Hoffman's intentional shooting of the decedent. §§ 776.012, 776.05, 933.15, Fla. Stat. (1985). *See also Tennessee v. Garner,* 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985). Accordingly, the judgment below is reversed and the cause remanded for entry of judgment on liability for the plaintiffs and new trial on damages. (A 2)

On November 8, 1985, at approximately 6:00 p.m., Herbert Harris was shot in the back with a shotgun and killed, by Deputy Joseph Hoffman of the Broward County Sheriff's Office, as he entered the back door of his home.

Hoffman was at the Harris residence to serve a search warrant. He was dressed in a black uniform with no markings to identify him as a law enforcement officer. It was dark. Hoffman had climbed over a six-foot locked gate in a dark area at the side of the home and had a good view of Mr. Harris who was in the well-lit backyard. Mr. Harris apparently saw Hoffman and ran towards the house with Hoffman following. Hoffman never told Mr. Harris to stop or he would shoot, never told him he was under arrest, and never fired a warning shot. He simply yelled "freeze" or "hold it" and believed he had said, "police". As Mr. Harris entered the back door, Hoffman shot him in the back at a range of 3-4 feet, according to a medical examiner, or 8-12 feet, according to Hoffman and Pat Garland, the firearm's examiner for the sheriff's department. Mr. Harris died at the scene.

SUMMARY OF ARGUMENT

Viewing the facts in a light most favorable to the defendants, the use of deadly force to serve a search warrant was, as a matter of law, unjustified in the present case. The deputy sheriff shot Mr. Harris in the back and killed him, as Mr. Harris was running into his house, and away from the deputy who was in the dark part of the yard and not in uniform. The shooting and killing of Mr. Harris, in order to carry out a search warrant, constituted excessive force as a matter of law. The trial court's denial of the plaintiffs' motion for directed verdict as to liability was error, and the Fourth District correctly reversed.

The brief opinion of the Fourth District presents no conflict, nor does the opinion of the Fourth District affect constitutional officers in any significant manner. The Fourth District merely held that under a particular set of facts, there was no issue for the jury as to whether deadly force was justified. Review should, therefore, be denied.

ARGUMENT

After viewing the evidence in a light most favorable to the defendant, the Florida Appellate Court determined that the record demonstrated, as a matter of law, "no justification for Officer Hoffman's intentional shooting of the decedent" (A 2). It was undisputed that Mr. Harris never threatened anyone with a weapon, he was unarmed, no weapon was visible, and there was no probable cause to believe that he had committed any crime involving serious physical harm. Nor had Mr. Harris threatened harm during the prior search of his residence, referred to by the defendant.

In *Tennessee v. Garner*, 471 U. S. 1, 105 S. Ct. 1694, 1697, 85 L. Ed. 2d 1 (1985), this Court set the standard for the use of deadly force by a police officer:

> This case requires us to determine the constitutionality of the use of deadly force to prevent the escape of an apparently unarmed suspected felon. We conclude that such force may not be used unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.

In *Tennessee v. Garner, supra,* a police officer shot and killed a burglary suspect. As here, the officer was able to see the suspect's hands, saw no sign of a weapon and, although not certain, was "reasonably sure that he was unarmed." When the officer called out "police, halt," the suspect started to climb over a fence. At that point, the officer shot the suspect in the back of the head. In declaring unconstitutional the Tennessee statute which allowed the use of all means necessary to effect the arrest of a fleeting suspect, this Court made the following relevant observations:

> The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. . . . Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. . . . A police officer may not seize an unarmed, nondangerous suspect by shooting him dead. . . . Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given. (105 S.Ct. at 1701).

* * *

Nor do we agree with petitioners and appellant that the rule we have adopted requires the

> police to make impossible, split-second evaluations of unknowable facts. We do not deny the practical difficulties of attempting to assess the suspect's dangerousness. However, similar difficult judgments must be made by the police in equally uncertain circumstances.
>
> . . . .
>
> Hymon did not have probable cause to believe that Garner, whom he correctly believed to be unarmed, posed any physical danger to himself or others. (105 S.Ct. at 1705-06).

The situation in this case did not even reach the level of that in *Tennessee v. Garner*. Here, there was no arrest being made. The officers were at the Harris residence simply to execute a search warrant, which implies a mere suspicion of criminal activity of the *premises*. *New York v. P.J. Video, Inc.*, 475 U. S. 868, 106 S Ct. 1610, 89 L. Ed. 2d 871 (1986); *Illinois v. Gates*, 462 U. S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983). An arrest, on the contrary, requires knowledge of the activities of the *person* to be arrested and presupposes a better sense of the propensities of that person than would exist at a search warrant stage and which, possibly, could justify a reasonable belief as to the degree of force necessary.

This Court should not exercise its discretion to review this case. The only issue is whether, under this particular factual situation, a sheriff's deputy was entitled to use deadly force in order to carry out a search warrant. The Florida appellate courts properly applied existing law in determining that the defendant's shooting and killing of Mr. Harris, in order to carry out a search warrant, constituted excessive force as a matter of law.

———————♦———————

CONCLUSION

Viewed in a light most favorable to the defendant, the use of deadly force to serve a search warrant was, as a matter of law, unjustified. The Florida appellate court properly reversed the trial court's denial of the plaintiffs' motion for directed verdict on liability based on *Tennessee v. Garner, supra*. The petition for certiorari should be denied.

Respectfully submitted,

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